

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 347 of 2000

For Approval and Signature:

HON'BLE MR.JUSTICE P.B.MAJMUDAR

- =====
1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the concerned : NO
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

DAKSHABEN SURESHBHAI AMIN

Versus

RAJEN RAMANBHAI PATEL THRO' CONSTITUTED ATTORNEY

Appearance:

1. Civil Revision Application No. 347 of 2000
MR MC SHAH for Petitioner No. 1
MR JAYESH M PATEL for Respondent No. 1-3
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CORAM : HON'BLE MR.JUSTICE P.B.MAJMUDAR

Date of decision: 19/02/2004

ORAL JUDGEMENT

#. The present petitioner is the original plaintiff of Special Civil Suit No.123 of 1995 which was filed before the Civil Judge (Senior Division) at Anand. Since the trial Court has dismissed the suit by resorting to the provisions of Order 9, Rule 8 of the Civil Procedure Code ("the Code" for short), it is not necessary to examine

the facts of the case of the plaintiff or of the defendants. At the time when Appeal from Order was preferred before this Court against the interim order of the trial Court, this Court has directed that the suit in question be decided expeditiously. The said suit was fixed for recording the evidence on 5.4.2000. On that day, on behalf of the original plaintiff, an application at Exh.223 was given requesting the Court to adjourn the matter on the ground that the witness who is required to be examined is not in a position to remain present in the Court as he is not well and the medical certificate was also produced along with that application. The learned trial Judge however came to the conclusion that the suit is required to be decided expeditiously and that earlier also such request for adjournment was made by the plaintiff. The learned trial Judge came to the conclusion that there is no chance of further cooperation from the plaintiff for expeditious hearing of the suit and that even on the last occasion the same request was made and that as the concerned witness is sick since last one year, but he is not required to take bed rest as he is treated as outdoor patient, the learned Judge found that there is no genuine reason to adjourn the matter. Ultimately, the said application was rejected. On that very day, the learned trial Judge passed another order and dismissed the said suit by resorting to the provisions of Order 9, Rule 8 of the Civil Procedure Code. It is the aforesaid order which is impugned in this revision application.

#. At the time of hearing of this revision application, Mr.A.J.Patel, learned counsel appearing for the respondents vehemently submitted that there is an alternative remedy available to the present petitioner under Order 9, Rule 9 of the Code by which the petitioner can approach the trial Court for setting aside the order passed under Order 9, Rule 8 of the Code. Since the petitioner has not resorted to such remedy, this revision application is not required to be entertained by this Court. At this stage, reference is required to be made to the provisions of Order 9, Rule 9 of the Code, which read as under.:

"9. Decree against plaintiff by default bars

fresh suit.- (1) Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was

called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit."

Mr.Patel has fairly submitted that if any such application is preferred by the petitioner within the stipulated time, the respondents herein shall not resist such application on the ground that it is time barred in view of the fact that the present revision application was pending before this Court till today.

#. Considering the aforesaid aspect of the matter, Mr.M.C.Shah submitted that the petitioner will prefer such application for setting aside the order passed by the trial Court under Order 9, Rule 8 of the Code. It is submitted that such application as provided under Order 9, Rule 9 of the Code will be submitted before the trial Court on or before 10.3.2004. If any such application is preferred by the aforesaid date, the trial Court is directed to decide the same on its own merits without rejecting the same on the ground of limitation. It is required to be noted that the order of the trial Court itself is under Order 9, Rule 9 of the Code. Therefore, it is clear that the application under Order 9, Rule 9 of the Code is maintainable in view of the clear cut order passed by the trial Court while dismissing the suit. The trial Court is directed to decide the said application on its own merits without taking into account the question of limitation or maintainability of that application. It is also clarified that while deciding such application, the trial Court shall not be influenced by the observations made earlier at the time of deciding the adjournment application Exh.223 and the same is to be disposed of on its own merits and in accordance with law.

#. In view of the aforesaid directions, Mr.Shah wants to withdraw this civil revision application. Permission is granted. This civil revision application stands disposed of as withdrawn subject to what is stated above. Rule is discharged with no order as to costs. Interim relief, if any, granted earlier stands vacated forthwith.

Direct service is permitted.

(P.B.Majmudar,J)
(pathan)